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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ORACLE AMERICA, INC.,

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

Case No. 3:10-cv-03561 WHA (DMR)

SUMMARY OF DEFENDANT GOOGLE INC.'S PROPOSED MOTION IN LIMINE TO EXCLUDE UNNECESSARY TESTIMONY CONCERNING CASE LAW, LEGAL PROCEEDINGS, AND RELATED MATTERS

Dept. Courtroom 8, 19th Fl.
Judge: Hon. William Alsup

MOTION AND RELIEF REQUESTED

Under Federal Rules of Evidence 401, 402, and 403, defendant Google Inc. ("Google") hereby moves the Court for an order excluding *in limine* all evidence, opinion and argument offered by Oracle America, Inc. ("Oracle") regarding (1) irrelevant and unnecessary discussion of legal concepts, history and standards other than those applied by experts as necessary to render their opinions; (2) statements purporting to repeat or interpret language in the Federal Circuit and District Court opinions rendered in this case; and (3) statements made by counsel in briefing and oral argument in the Federal Circuit and District Court proceedings in this case. It is the province of the Court to instruct the jury with regard to the law (including case law) that the jury must consider and apply in rendering its verdict. *See Burkart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997) ("Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards."). Further, attorney statements in oral argument or briefing constitute argument, not evidence for the jury. *In re Ahaza Sys., Inc.*, 482 F.3d 1118, 1122 n.1 (9th Cir. 2007) ("arguments and statements of counsel are not evidence").

Here, however, Oracle seeks to inject (through experts and other witnesses) its own detailed interpretation of the historical background of applicable law, including testimony repeating or interpreting language from the opinions of this Court and the Federal Circuit. *See, e.g.*, Bayley Decl., Ex. C nn. 7, 9-10, & n. 28; ¶¶ 33, 36, 54, 64 (Kemerer, 1/8/2016 Report) (citing court opinions); Ex.A ¶¶ 174-88 (Jaffe, 2/8/2016) (discussing the importance of copyright and intellectual property, its constitutional underpinning, the purpose of the Copyright Act); Ex. F ¶¶ 43-46, 280 (Malackowski, 1/8/2016 Report) (discussing "Statements by the District Court"). Such evidence is not relevant to the jury's consideration of fair use, and is therefore inadmissible. Furthermore, this type of testimony and/or argument will only confuse the jury, as well as unduly prejudice Google by encouraging the jury to view Oracle, and not this Court, as instructing the jury as to the law. Fed. R. Evid. 403.

Dated: March 23, 2016

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ORACLE AMERICA, INC.

Plaintiff,

v.

GOOGLE INC.

Defendant.

Case No. CV 10-03561 WHA

ORACLE'S RESPONSE TO GOOGLE'S SUMMARY MOTION IN LIMINE RE: CASE LAW AND LEGAL PROCEEDINGS

Dept.: Courtroom 8, 19th Floor
Judge: Honorable William H. Alsup

Google's motion to exclude all evidence, opinion, and argument that acknowledges or applies applicable law flies in the face of this Court's orders and the law of the case doctrine. This Court has on numerous occasions acknowledged that the Federal Circuit's opinion is law of the case, and that it will form a large part of the jury's instructions on fair use. ECF No. 1518 (Request for Brief on Jury Instr.); Feb. 24, 2016 Hr. Tr. 51:9-14 ("[W]e have some law of the case here … basically I'm just going to lift what the Federal Circuit told us and tell the jury that."). The jury will be instructed that this trial is about infringement subject to fair use because of the first jury's verdict, party admissions, and the Federal Circuit's decision. ECF No. 1488 at 2. Indeed, Oracle's experts reviewed the law and rendered opinions consistent with it, as required for their opinions to be admissible. *See Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1328 (Fed. Cir. 2014).

Google's motion argues that its judicial admissions should be excluded because they are "not evidence for the jury." However, "[u]nequivocal admissions made by counsel … are judicial admissions binding on his client" that "have the effect of withdrawing a fact from contention." 30B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 7026 (2014); *accord Hilao v. Estate of Marcos*, 393 F.3d 987, 993 (9th Cir. 2004) ("A party … is bound by concessions made in its brief or at oral argument."); *In re Crystal Props., Ltd., L.P.*, 268 F.3d 743, 752 (9th Cir. 2001) (same). Google has admitted certain facts and removed them from contention. *See, e.g.*, Fed. Cir. Or. Arg. at 1:02:53-3:01 (Google admitting its copying was for "entirely a commercial purpose"); *accord* Tr. 1418:15-20 (Google admitting to this Court: "that it's a commercial use is not in dispute").

Not only should the jury be informed that such facts are not in dispute, but, as the Court did before the first trial, it should ***deem facts admitted*** to streamline the trial. Such facts should include those the Federal Circuit found as fact or held to be undisputed or admitted. Oracle intends to request in due course that those facts be deemed admitted. If those facts are deemed admitted, the jury will be so informed. If those facts are not deemed admitted, Oracle will have to prove them the hard way, which includes reading and playing audio and video of particular party admissions to the jury. *See, e.g.*, Tr. 977:9-978:1.

Dated: April 4, 2016

Respectfully,

Orrick, Herrington & Sutcliffe LLP

By: */s/ Annette L. Hurst*
Annette L. Hurst

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